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IN THE

Supreme Court of the United States

October Term, 1953.
No. 17.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,
Petitioners,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, *et al.*,
Respondents.

RESPONSE TO PETITION FOR REHEARING.

The Petition of Partmar Corporation and Fanchon & Marco, Inc., for a Rehearing upon the opinion and judgment entered February 8, 1954, should be denied.

The Petition states no new or different facts. It cites no new authority. It is but a rehash of the arguments which this Honorable Court rejected in its opinion after these arguments were fully presented in the Petition and Brief for Petitioners and answered in the Brief of Respondents, and after oral argument was heard on each of these contentions.

Respondents will not burden this Honorable Court with a detailed reply to each of the 21 purported reasons assigned by Petitioners. Respondents do, however, desire to point out with respect to the principal contentions that

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they are not new and to direct attention to the manner in which they have already been fully presented to and correctly determined by this Honorable Court.

Before doing so, we wish to restate the indisputable facts in this case reduced to their simplest form.

Paramount owned a theatre in downtown Los Angeles which it desired to lease to a suitable tenant. Petitioners desired to lease it and needed an assurance of Paramount product to operate it successfully. Paramount had a mutual interest with Petitioners in that it would have a satisfactory theatre in which its pictures would be shown first run in Los Angeles as the "showcase" for its pictures there. Out of these mutual desires and reciprocal benefits, the terms of the franchise and the lease were negotiated at arm's length.

At the trial, Paramount sought to cancel the lease and franchise in view of the decision in *United States v. Paramount* and to obtain possession of the theatre. Petitioners defended on the ground that the franchise and lease were valid and could not be terminated. Petitioners successfully urged that the franchise and lease were not a part of any conspiracy and were valid. The court so found. Petitioners retained possession of the theatre and obtained the full benefits of the lease and franchise for the balance of the term thereof.

Petitioners now seek to retain the fruits of their bargain and at the same time seek treble damages, claiming that they were forced by the conspiracy found in *United States v. Paramount* to pay exorbitant license fees and excessive terms for the pictures licensed under the franchise. At the trial, in defense of Respondents' cause of action for possession and declaratory judgment, Petitioners

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claimed the opposite, namely, that the franchise and lease were *not* entered into as a part of any conspiracy.

Respondents say, therefore, that on these facts the decision of this Court in affirming the judgment below is sound and should not be disturbed.

1. Effect of Decree in United States v. Paramount.

Petitioners assert (Pet. Reh. 2) that the decree in *United States v. Paramount* was entitled to conclusive effect and rendered unnecessary proof regarding conspiracy.* This same contention was made (Pet. Br. 25-31), was answered (Resp. Br. 76) and properly disposed of in the opinion [Op. 13] where it is pointed out that *prima facie* evidence of *a* conspiracy would be "no evidence that the Paramount lease was part of that conspiracy." This is, of course, equally true with respect to the franchise.

2. Legality of the Lease and Franchise Was at Issue in Trial of Possessory and Declaratory Relief Causes of Action.

Petitioners claim (Pet. Reh. 2) that the legality of the lease and franchise agreement was not an issue raised by the pleadings in the trial of the first, second and fifth causes of action. This assertion was also made (Pet. 9; Pet. Br. 24), and answered (Resp. Br. 45-47). The

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*In no event could the decree in *United States v. Paramount* have the conclusive effect of establishing a conspiracy in this case. Section 5, Clayton Act; *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 568-569; *Theatre Enterprises v. Paramount*, 346 U. S. 537.

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opinion aptly points out in disposing of this question [Op. 4]:

> "The complaint sought, so far as material here, restitution of possession based on illegality of the franchise under the Sherman Act *as construed in the decree* in the Southern District of New York, *supra,* and a declaratory judgment that the lease had been properly terminated."

Petitioners' further assertion that the issue of conspiracy could only have been injected into the trial by amendment to the complaint and that no amendment was at any time sought or made (Pet. Reh. p. 2, par. 3) is not well taken. This is simply another way of stating the same argument that the issue of conspiracy was not raised by the pleadings. Since that contention was fully discussed and correctly answered by the opinion of this Court, as shown *supra,* that is an end to the matter.

3. Finding That Lease and Franchise Were Not Part of Conspiracy Is Conclusive of Counterclaims.

Petitioners contend that the finding of no connection between the franchise and any conspiracy is not conclusive of the counterclaims because the counterclaims "do not attribute the excessive terms and conditions to the lease and franchise but to the conspiracy" (Pet. Br. 3) and "petitioner was entitled to recovery for any injury resulting from any of the means used in the course of or to effectuate that conspiracy" (Pet. Reh. 4). This is not new. The same argument was made before (Pet. Br. 16). Respondents answered it (Resp. Br. 20-22). The opinion correctly notes that the gravamen of the counterclaims was that "the conspiracy was alleged to have resulted in the

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imposition of excessive terms on Partmar by the lease and franchise agreement." The only injury alleged was the imposition of "excessive terms, conditions and charges for the photoplays." No such terms, conditions or charges existed with respect to such photoplays except those provided in the lease and franchise agreement and in amendments thereto (Resp. Br. 22).*

4. Petitioners Successfully Contended in Trial Court That Lease and Franchise Agreement Was Lawful.

Petitioners did not, as they now claim (Pet. Reh. 5) confine their argument to the narrow proposition that the lease and franchise agreement was inherently valid. This

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*Petitioners assert that the franchise was merely an agreement to make contracts in the future for 10 years and named prices for pictures for the first year only (Pet. Reh. 4, par. 10). This same argument was made by petitioners in their earlier brief (Pet. Br. 3). This contention advances petitioners nowhere. The franchise agreement provided that the parties shall endeavor to agree for each successive year after the first year as to the terms and conditions upon which photoplays licensed under the franchise agreement shall be exhibited [Tr. 266-267] and provided that in the event of a failure to agree annually upon such new terms, the terms and conditions contained in the franchise for the first year should govern [Tr. 267]. The subsequent changes with regard to rental terms and conditions were effected by riders to the franchise agreement, each of which were termed "amendment and supplement" to the franchise. (These are all in the record below.) The finding of the trial court expressly covered all such amendments to the franchise agrement by expressly finding that "neither said franchise agreement, nor said lease, *nor any amendment to either of them,* constituted any part of, nor were they or any of them entered into as a result of any . . . conspiracy" [Tr. 104]. The trial court's conclusions specifically covered all such amendments by concluding that ". . . said lease and said franchise agreement and *all amendments to each of them* were in all respects lawful and were not entered into nor performed as a result of any combination or conspiracy . . ." [Tr. 107].

Hence there is nothing either new or sound in this suggestion of petitioners.

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same claim (Pet. 11; Pet. Br. 8) was answered (Resp. Br. 25-27) where full quotations from Petitioners' trial brief are set forth together with expressions of the trial court which provoked them. Those expressions made it clear to Petitioners that the court would hold the lease and franchise illegal and evict them if not satisfied it was a thing apart from any conspiracy. Thus Petitioners' assertion in their trial brief that "on the evidence in this case the *Partmar franchise* is neither one of a system, or made by one holding a dominant position, or *pursuant to a conspiracy*" [Tr. 65] was clearly a request that the court find as a fact (which it did [Tr. 103-104]) that the lease and franchise agreement was no part of any conspiracy. The opinion of this Honorable Court thus correctly states that "Partmar vigorously contended in brief and in argument that the lease of the theatre and the franchise for 'first-run' exhibitions did not in any way violate the Sherman Act" [Op. 6].

5. Trial Court Correctly Entertained and Adjudicated the Issue of Conspiracy Connected With Lease and Franchise Agreement.

The Petitioners were not restrained from showing, as they claim (Pet. Reh. 6) and as they claimed (Pet. 9-10; Pet. Br. 9), that the lease and franchise agreement was a part of a conspiracy by any ruling concerning the admissibility of the decree in *United States v. Paramount*. They were in fact *invited* by the trial court to offer the decree for this purpose [Tr. 31; Resp. Br. 30]. Having declined this invitation and having further urged that this

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agreement was not in fact part of any such conspiracy, it does not lie in Petitioners' mouths to assert (Pet. Reh. 6) that it was impossible for the court to adjudicate this issue.*

6. Remunerative Character of Lease and Franchise Not an Issue.

The attempt of Petitioners to support their Petition by groundless and improper assertions *dehors* the record (Pet. Reh. 7) that the lease and franchise "were not highly remunerative" to them is beside the point. If the agreements as executed were not desirable to them they were not forced to enter into them nor to insist that they

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*Both parties are concluded by a finding and judgment in a prior suit, or in a prior phase of the same litigation, whether or not the party having the burden of proof of a particular issue upon which a finding is made offers any evidence in support thereof. Restatement of Judgments, Sec. 68, p. 303, states:

> "On the other hand, if a question of fact is put in issue by the pleadings, and at the trial the party who has the burden of proof offers no evidence in support of his allegations, and the court directs a verdict against him, the question is litigated and a judgment on the verdict is conclusive between the parties as to the question."

This rule of law further answers petitioners' argument that "it was impossible to determine on the evidence in this case that the franchise was not connected with conspiracy" (Pet. Reh. 6). Whether or not petitioners or respondents offered or failed to offer evidence of the claimed conspiracy in the eviction phase of the litigation is wholly beside the point, as a matter of law, since the issue was before the trial court, petitioner argued that no such conspiracy was connected with the franchise, and the court made a finding directly on that issue. Under the law, the finding is binding on both parties, regardless of who had the burden of proof on that issue and regardless of what evidence was introduced on the subject. Moreover, as the parties benefited by this finding in the eviction phase of the litigation, petitioners are precluded by the rule of judicial estoppel from attempting to take the diametrically opposite position in any subsequent phase of the litigation and seek to prove that there was a conspiracy connected with the franchise.

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be validated. The fact they did so insist is hereinbefore shown, and demonstrates the fallacy of their position.

Petitioners also make the unfounded and incorrect assertion that the franchise was terminated prior to and as a basis for the eviction suit and "was not continued or resumed at any time" (Pet. Reh. 7). That is totally inaccurate. The trial court expressly concluded that "Paramount had no right to cancel or terminate the franchise agreement" [R. 107], and adjudged that the lease and franchise were valid and subsisting agreements "in full force and effect" [R. 110].

7. No Enforcement of Rights Arising Out of an Illegal Contract Was Involved.

Petitioners again charge (Pet. Reh. 7) that the trial court improperly entertained Respondents' suit to recover possession of the theatre on the ground of illegality of the lease and franchise agreement. This charge was fully presented (Pet. 22-23; Pet. Br. 21-23) and answered (Resp. Br. 50-54). The reason compelling Paramount to test the legality of the lease and franchise agreement in order to comply with the law are set forth (Resp. Br. 17). The opinion [Op. 6] clearly points out that under California law a lessor may repossess property withheld pursuant to an unlawful lease citing *Glos v. McBride,* 47 Cal. 688, 191 Pac. 67, so holding. No repudiation of the principle that courts will refuse to enforce rights arising out of illegal agreements is involved.

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Conclusion.

The Opinion of this Court shows that all Petitioners' arguments were given careful consideration and rejected. No good reason is suggested by Petitioners why further consideration should produce a different result. The Petition should be denied.

Respectfully submitted,

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O'MELVENY & MYERS,
Of Counsel.

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